NO. 21832

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,)

Appellant,)

vs.) BRIEF OF APPELLEE

KENYON FARMS, INC.,)

Appellee)

_____/

* * * * * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

* * * * * *

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I N D E X

CITATIONS

CASES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, vs. KENYON FARMS, INC., Appellee.	BRIEF OF THE APPELLEE No. 21832

STATEMENT OF ADDITIONAL FACTS

In addition to the facts set out in the brief of the Appellant, the following facts must also be considered in order to receive a full picture of the transaction.

Kenyon Farms did not have a written lease of any description with Martindale during any of the time in controversy, although Kenyon Farms' President, W. B. Whiteley, personally had entered into a written lease with Martindale on a lease form furnished by the Farmer's Home Administration covering the lands in Cassia County as described in the mortgage. Martindale was a tenant on the farm owned by Whiteley in the same year and for the same cropping season of 1960 and 1961. W. B. Whiteley personally financed all of Martindale's farming operation in 1960 and 1961 and the consideration of the mortgage held by the Government was for an antecedent debt owed by Martindale on previous loans made to him by the Farmer's Home Administration, and the Farmer's Home Administration in the year 1960 and 1961, did not disburse any funds whatsoever in the production of the crops, either on the Whiteley property set out in the mortgage, or on the Kenyon Farms

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property.

Notwithstanding the findings of the Court, and notwithstanding the answer of the Plaintiff, Mr. Whiteley's explanation at trial clearly discloses that he never at any time considered that Mr. Martindale was leasing any land from Kenyon Farms, but that Martindale was operating the land at Kenyon Farms for and on behalf of Whiteley personally.

The United States Government changed its form of mortgages in the year 1960 and 1962 providing therein the clause in the mortgage which is the subject of this litigation. Prior to that time, there was no such omnibus clause in the Government's mortgages.

The Government mortgage was filed, not recorded in the office of the County Recorder of Cassia County, and a person searching the records would necessarily examine the document actually filed rather than a typewritten transcription of the same.

SUMMARY OF ARGUMENT

A reasonable third party title searcher is not deemed nor expected to discover the description of property mortgaged when the same is contained in the fine print portion of the mortgage rather than in the filled in blank places set apart for that specific purpose.

Secondly, the description of the crops set out in the mortgage are insufficient to cover crops grown on the Kenyon Farms and such crops are not described with such particularity as required by law to give notice of the lien to a purchaser

ARGUMENT

There are two main questions involved in this case:

First, whether or not a reasonably diligent person would have taken notice of the clause in the Government mortgage wherein it attempted to cover all crops leased by the tenant, and

Secondly, whether or not the description of the property is sufficient to give a third party notice that there was a lien of the crops grown on lands owned by the Kenyon Farm, Inc.

It is significant to point out at the outset, that we are not concerned in this case of the validity of a hidden clause in a contract as it affects the two contracting parties, but rather the question here is whether or not a third party on diligent search of the records of the County, would be deemed to have received notice of the existence of the hidden clause, or be mislead by it. Therefore, the cases cited in the Appellant's brief dealing with construction of contracts between parties are not in point.

The mortgage filed was on a printed Government form furnished for Martindale's signature by the Government, and the blanks set out therein were filled in by the contracting parties with a typewriter prior to filing. The Government form used was new, in that it had not been used prior to 1960, but was used for the 1960 and 1961 crops in this area. Knowing that the instrument was a crop mortgage and its general legal effect

of being a lien on the property described, a reasonable diligent lien searcher would then look for three distinguishing features that would make this instrument different from any others like it, to-wit:

First, would be the parties involved. Which of course in this case is Blaine Martindale and his wife as Mortgagors, which was typewritten on the instrument.

Second, would be the amount of the mortgage, which was likewise typewritten upon its face.

Third, would be the description of the property mortgaged. This also was typed in particularily upon the face of the mortgage, being the crops grown on the Whiteley leased land.

No reasonable careful examiner would be required to read all the fine print and "boiler plate" paragraphs to determine if some other property was to be included in the mortgage, especially when particular property was typewritten thereon. Consequently, the distinguishing feature in any mortgage which makes it unique, distinctive and individual is the typewritten portion of the mortgage, and not the fine print printed thereon, and a third person would only be required to read the typewritten portions thereof which is the essential differentia and the distinguishing features of each mortgage. Consequently, the fine printed portion was a trap. This was especially true when the Government changed forms in this area the year this mortgage was recorded

The Appellant has cited an Idaho case of longstanding,

Livestock Credit Corporation vs. Corbett, 22 Pac 2d, Page 874, in support of their contention that the provisions similar to those in the mortgage in question has had court approval in this state. A careful reading of the said case discloses that it does not support the Appellant's contention, but in fact, sets out a rule of law which sets up the criterion of when a chattel or property is sufficiently described therein as to constitute notice to a third party.

When applying the rule of that case to the facts herein, it leads to the only one conclusion that the chattels and crops grown on Kenyon Farms were not sufficiently described in the mortgage within the rule set out in the case, and for such reason, did not constitute legal notice to a third party or to Kenyon Farms, who purchased the crops.

The rule set out in the above cited case on Page 875 is as follows, to-wit:

> "The general rule as to the sufficiency of chattel mortgage descriptions, applicable to both objections urged by appellant, is announced in McConnel vs. Langdon, 3 Idaho (Hasb.) 157, 163, 28 P. 403, 405 as follows: 'A description of property is sufficient if it will enable a third person, aided by inquiries suggested by the instrument, to identify the property.'"
>
> The Idaho Supreme Court further said on Page 876:
>
> "Coming now to the sufficiency of description in Respondent's mortgages of the land on which the hay was

to be raised, an examination thereof discloses that they cover 'all that certain personal property now in the possession of the Mortgagor(s), in the county(ies) of Bannock, State of Idaho, described as follows:.... also all hay grown or now growing, or to be grown, on all lands owned, leased or controlled, by the Mortgagor(s).'

It is therefore clear that such mortgages covered hay grown or to be grown on all land owned by the mortgagor in Bannock County. It is conceded that the hay in question was grown upon the Bancroft place in Bannock County, owned by the mortgagor. An examination of the county records would disclose the fact that the mortgagor was the owner of the land referred to as the Bancroft place, located in Bannock County, and appellant must have had actual knowledge of its ownership by the mortgagor by reason of the fact that his mortgage above referred to, given by the mortgagor, covered hay to be grown on such premises. The description set forth in the mortgages was such that a third person aided by inquiries suggested thereby, could identify the hay covered by the mortgage and the land on which it was raised." (Emphasis added)

It is significant to note that the Court placed great emphasis on the fact that the hay was grown upon the Bancroft Place in Bannock County owned by the mortgagor and such could be

ascertained from the records, and the further fact that the First National Bank of Bancroft had a second lien upon the very same described property.

In the case at bar, we have an entirely different fact situation in that the crops in question were grown on Kenyon Farms which Martindale operated with no written lease arrangement. The important part of the rule of the Idaho case is the phrase "aided by inquiries suggested by the instrument".

In the Corbett case, the instrument suggested property owned by the Mortgagor and the Court stated that examination of the County Records would disclose the fact that the Mortgagor was the owner of the land referred to as the Bancroft Place located in Bannock County.

Now in the case at bar, in the application of this rule, let us examine the facts. What is suggested in the instrument itself which inquiries could be made to identify the property in question, i.e. crops grown on lands owned by Kenyon Farms? What could be obtained by a search of the records and what inquiry could be made? A search of the records would show that Mr. Martindale owned no other lands, or at least did not own the Kenyon Farms lands. So far as a lease is concerned, what would the records reveal? A search of the records would reveal nothing because there was no written lease made, and consequently none recorded.

There is nothing suggested in the property description which would lead a third party to identifying the crops grown

on Kenyon Farms. Certainly, Kenyon Farms and Martindale were complete strangers so far as any records were concerned. What then must a third party do further if he runs into a blind alley so far as written instruments are concerned? The rule does not require any searches or inquiries outside the filing or recordings in the Court House. Certainly, the only suggestion of any lease in existence is the written lease with Whiteley personally, described in the mortgage itself. This itself would divert any further inquiries to ascertain if Martindale had an oral lease on some other property in the county. The enumeration and setting out specific property precludes other property not mentioned. But even if further inquiries were required, what would be the result? Any third party asking Mr. W. B. Whiteley, President of Kenyon Farms, whether or not there was an oral lease, would have received the answer "no" becuase Mr. Whiteley maintained throughout the trial that Mr. Martindale had no such lease with Kenyon Farms. What would an inquiry of Blaine Martindale himself reveal? As set out on Page 9 in the brief of the Appellant, Blaine Martindale at the trial concluded that "the mortgage seemed to cover everything that I would operate", not that it did. Even in his expression, there was a slight doubt as to just exactly what was covered by the mortgage.

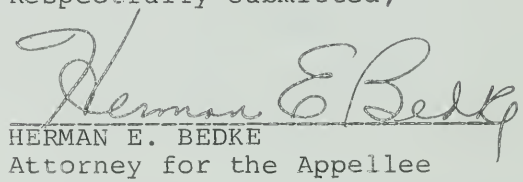
We submit that the description of the mortgaged property would give a clue to absolutely no further inquiries and for that reason, under the strict interpretation and rule of law of the Corbett case, the description was fatally defective

and void as against the Appellee.

CONCLUSION

The Conclusion of Law and Judgment of the District Court should be affirmed in all respects.

Respectfully submitted,



HERMAN E. BEDKE
Attorney for the Appellee

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HERMAN E. BEDKE

AFFIDAVIT OF SERVICE

STATE OF IDAHO)
:ss
County of Cassia)

HERMAN E. BEDKE, being duly sworn says:

That on September 29, 1967, he caused copies of the foregoing brief for Appellee to be served upon Appellant by placing them in the United States Mail, air mail, postage prepaid, in an envelope addressed to counsel as follows:

Three copies to: CARL EARDLEY
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Herman E. Bedke

HERMAN E. BEDKE, Attorney
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Counsel for Appellee

SUBSCRIBED AND SWORN to before me this 29th day of September, 1967.

Notary Public for Idaho

My Commission expires: March 22, 1970.